No. 91-1502

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In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.,
APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE APPELLANTS

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The census was completed on December 26, 1990. The President transmitted the required statement to Congress on the apportionment of Representatives on January 3, 1991. The Clerk of the House of Representatives certified the number of Representatives to which each State is entitled on January 16, 1991. Most States have now completed redistricting, primary elections have taken place or are imminent, and the general election of Representatives and the President is less than seven months away. Yet litigation over the conduct of the 1990 census continues in this Court and in lower courts across the Nation. It is time for this Court to confirm what Congress specified in the Census Act: that the Secretary of Commerce should conduct the census "in such form and content as he may determine."

A. *Historical background.* In their opening brief, appellees attempt to establish an overall historical theme that is factually inaccurate, legally misconceived, and anomalous.

1. Appellees assert that, with the exception of the 1970 census, "census authorities have never counted persons living overseas on the census date as residents of particular states," and that "usual residence at the time of the census • • • is how *all* of the civilian and military inhabitants of the United States have been apportioned since 1790." Br. 2, 41-42 n.13.[1] Neither statement is true. For example, persons living overseas were counted as residents of particular States at least in the following instances, in addition to the 1970 census (see Gov't Br. 4-5 & n.1):

- The 1900 instructions specified that military and civilian personnel "at a station at home or abroad" should be counted at their family home in the United States, "even though • • • absent on duty at the time of the enumeration."
- Instructions from 1870 to 1920 specified that seafarers were to be counted "at their land home, no matter how long they may have been absent."
- Instructions from 1910 to 1940 specified that citizens "abroad temporarily at the time of the enumeration" should be counted at their family home in the United States, adding that "[i]t does not matter how long the absence abroad is continued, provided the person intends to return to the United States."

In fact, in 10 of the past 13 censuses, the enumerators' instructions have expressly provided for including certain persons outside the United States for extended periods in the apportionment counts. *Ibid.*[2]

[1] Citations are to the printed version of appellees' brief.

[2] Appellees' mistaken characterization of history stems from a misreading of Stipulations 26 and 28 (J.A. 179-180.) Stipulation 26

Appellees' statement that usual residence is how "*all*" inhabitants have been apportioned since 1790 is no more accurate. For example, in addition to the foregoing specific rules for apportioning those abroad (see Gov't Br. 4-5 & n.1):

- Boarding school students are counted not where they live and sleep most of the time, but at their parents' home.
- College students were counted not where they lived and slept most of the time, but at their parents' home, from 1900 through 1940.
- Members of Congress may be counted in their home districts, even though they live and sleep most of the time in or near the District of Columbia.
- Again, the 1900 instructions specified that federal personnel should be counted at their family home, even if living or sleeping at a station at home *or* abroad.

Indeed, the Census Bureau policy paper on which appellees rely in other contexts expressly states that "[t]he adoption of usual residence as the main residency rule

states only that "[t]he 1970 and 1990 censuses are the only times that the Census Bureau has included, *as a separate group*, counts of overseas Federal employees living in foreign countries on the census date in the population counts used for purposes of congressional apportionment." J.A. 179 (emphasis added). In other words, only in 1970 and 1990 were overseas personnel separately counted based on their status as stationed abroad, and those counts apportioned based on home of record (or backup data). In 1900, by contrast, military or civilian employees abroad were included in the apportionment count through the regular conduct of the census in the United States, as members of a family in the enumerator's district. Stipulation 28—the other portion of the record cited by appellees—simply describes the circumstances of including federal personnel stationed abroad in state apportionment counts in 1970, without stating that it was unprecedented to do so. J.A. 179-180. The passage in the district court's opinion cited by appellees (J.S. App. 64a) makes these same points, and, like appellees, does not mention the 1900 instructions.

for 1990 does not mean that the Census Bureau will not modify that rule." J.A. 209.

2. The defect in appellees' historical theme, however, is more fundamental. Under the rigid rule appellees propose—which they apparently contend is constitutionally compelled (see Br. 7-8, 16, 56-65)—the "only exception" to counting people where they live and sleep most of the time on census day "is for persons, such as travelers at inns and hotels, who are 'occasionally absent' from their homes for a few days or weeks as of the census date." Br. 8 (quoting Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 103). There is no historical or legal foundation for this crabbed view of who (to use the language of the first Census Act and the Census Clause) may be regarded as "belonging" among the "respective Numbers" of the States. § 5, 1 Stat. 103; Art. I, § 2, Cl. 3.[3]

In the first place, as we have just pointed out, the enumerators' instructions for most of the censuses since 1870 have expressly provided for inclusion of certain categories of persons who were absent for far more than "a few days or weeks" on the census date. Moreover, the first Census Act (and the succeeding five Census Acts through 1840) provided not only that persons whose "usual place of abode" is in a family shall be returned as of that family, but also that "every person occasionally absent at the time of the enumeration [shall be returned], as belonging to that place in which he usually resides in

[3] Appellees apparently confuse the *definition* of "usual residence," as articulated under current administrative policy, with the counting of a person who is *away* from his usual residence. Thus, appellees cite (Br. 8) Stipulation 8, which states that under a "1983 intra-agency memorandum" concerning the 1990 census, "the Census Bureau defined 'usual residence' operationally as where a person spends four nights a week, or more than 182 days in a calendar year." J.A. 174. Nothing in that definition, however, suggests that a person may not be counted at his usual residence if he is away (*e.g.*, on an extended business trip, at boarding school, or while serving in Congress) for more than three nights a week or 182 days in a calendar year. See Gov't Br. 4 & n.1.

the United States." § 5, 1 Stat. 103. Nothing in this text imposed an arbitrary limit (particularly "a few days or weeks") on the length of time a person could be absent from a place and yet nevertheless be counted at that place.

In addition, the first Census Act (and succeeding Acts) provided for the counting of "inhabitants" of the States (§ 1, 1 Stat. 101), and the debates on the Census Clause likewise refer to an enumeration of "inhabitants." James Madison—who had a hand in drafting the first Census Act—understood that the term "inhabitant" "would not exclude persons absent occasionally *for a considerable time on public* or private *business*." See Gov't Br. 34. Furthermore, the directive in the first Census Act to count those absent at their usual residence "in the United States" makes it clear that the contemplated absences included those outside the United States—which were apt to be for an extended period in 1790 and the decades following. Thus, the earliest Census Acts were plainly broad enough to permit inclusion in state apportionment counts of persons who were out of State (and out of the country), even "for a considerable time," in the service of the United States.

The reference to persons "occasionally absent" from the place at which they usually resided in the United States was omitted from the Census Act of 1850. Act of May 23, 1850, ch. 11, 9 Stat. 428. The enumerators' instructions for the 1850 census, however, provided not only that all persons whose "usual place of abode" was with a particular family were to be enumerated with that family, but also that "[a]nyone who is temporarily absent on a journey, or for other purposes, without taking up his residence elsewhere, and with the intention of returning again, is to be considered a member of the family." See Gov't Br. 4.

In short, the constitutional, statutory, and administrative materials from the first census through the twentieth confirm the propriety of including in the apportion-

ment counts certain categories of individuals who were out of the country for extended periods of time. Appellees, by contrast, have not cited a *single* authority suggesting that it is unlawful to do so.[4] Thus, the Secretary's decision to include federal personnel serving their country abroad in the 1990 census counts for the States was firmly rooted in precedent.

3. Nor, contrary to appellees' view (Br. 65-67), is there anything anomalous or unfair about regarding Americans who are serving their country abroad (and their dependents) as still "belonging" among the "respective Numbers" of the States for purposes of the census. On the contrary, as the administrative record confirms, such persons: pay taxes and vote in the United States; typically have strong family ties here; are often abroad involuntarily; generally have specified periods of service and will return; obviously have close ties to the United States government and are still under United

[4] Appellees cite (Br. 9) Stipulation 18, which states that "[i]n 1830 and 1840 and in every census since 1900, the Census Bureau has obtained administrative counts of at least a portion of the American population living overseas as of each census date," and that with the exception of 1970 and 1990, the Bureau has not included such persons in state populations for apportionment purposes. J.A. 177. However, that stipulation concerning the practice with respect to federal personnel or others who were counted "as a separate group" on the basis of their station abroad (Stip. ¶26 (J.A. 179)) says nothing about the prior authority for and practice of counting persons abroad in the course of the census in the United States. See note 2, *supra*.

Moreover, Stipulation 19 states that "[f]or purposes of apportionment of soldiers to states, the United States government first promulgated a specific written rule in connection with the *1880 census*." J.A. 177 (emphasis added). This stipulation refutes appellees' suggestion that there were prior legal standards on the question. The 1880 rule was that soldiers, civilian employees, and other residents at posts or military reservations "will be enumerated in the district in which they reside, equally with other elements of the population." *Ibid.* That rule did not specifically address the situation of a soldier or civilian serving abroad, who would not have been in an enumeration district.

States jursidiction; regard the United States as their home; and regard themselves as being represented in Congress. See, *e.g.*, J.A. 47, 73, 120, 124.

There is, moreover, a great deal of common sense in relying on the home of record of a service member stationed abroad—his "permanent home or actual home" at the time of enlistment (Gov't Br. 6)—to determine the State to which the service member "belongs" and may be regarded as an "inhabitant" of for these purposes. The home of record was the last place in which he chose to reside (see Gov't Br. 9, 42), and involuntary transfers by the military after that time do not necessarily manifest an affirmative intention to abandon that home and to assume a permanent residence elsewhere.

In these respects, home of record has characteristics in common with the familiar legal principle of domicile. Ordinarily, a person's domicile continues until it is superseded by a new domicile, typically by choice, which requires both physical presence at the new domicile and an intention to make it one's home for the time at least. See Restatement (Second) of Conflict of Laws §§ 11, 16, 18, 19 (1971). However, a person does not ordinarily acquire a domicile of choice by his presence in a place under compulsion—a rule that applies to a soldier or sailor ordered to a new duty station. *Id.*, § 17 & comment d; see also *id.*, § 12, illustration 4 (a naval officer may retain his "home" even though he "is away much of the time and often for more than a year at one time").[5]

Significantly, Massachusetts itself follows these very principles for federal military and civilian personnel in other contexts. For example, it has no difficulty considering its service men and women serving overseas as its

[5] We do not contend, of course, that these general common law principles of domicile are controlling with respect to the ability of military personnel to claim or change a domicile. See, *e.g.*, 50 U.S.C. App. 574.

own when it comes to taxing them,[6] and it authorizes them to vote.[7] Yet when it comes to counting these persons for purposes of determining representation in Congress, Massachusetts insists that federal military and civilian personnel stationed abroad are (and indeed constitutionally must be) inhabitants of *no* State, including Massachusetts itself. They quite literally do not "count."

B. *Unavailability of Judicial Review.* The district court had no authority to set aside the state census totals and order a reapportionment of the House of Representatives based on its own disagreement with the manner in which the Secretary chose to include federal personnel abroad among the respective populations of the States, be-

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[6] Massachusetts subjects to its income tax every "inhabitant of the commonwealth." The term "inhabitant" is defined to mean "any natural person domiciled in the commonwealth." See Mass. Ann. Laws ch. 62, §§ 1, 25 (Law. Co-op. 1978 & Supp. 1989). Income earned by Massachusetts domiciliaries serving in federal military or civilian positions abroad is therefore subject to the Commonwealth's income tax. See Mass. Dep't of Rev. Ltr. Ruling 84-15 (Jan. 19, 1984) (member of U.S. Foreign Service posted in Africa subject to Massachusetts income tax because "[a]n individual who is a Massachusetts domiciliary will remain so and will be subject to Massachusetts income taxation until he establishes a new domicile out-of-state with the intention of making the new location his home. Neither a temporary nor protracted absence from Massachusetts will effectuate a change of domicile for an individual unless all the requisites for such a change are present.").

[7] See Mass. Ann. Laws ch. 54, § 103B (Law. Co-op. 1990) (defining "[s]pecially qualified voter" to include, *inter alia*, "those persons in the active service of the armed forces of the United States, and their spouses and dependents, who are absent from the city or town of their residence * * * whose last domicile immediately prior to departure from the United States was, or whose present domicile is Massachusetts, and who are otherwise eligible to register as voters"). See also 42 U.S.C. 1973ff *et seq.* (protecting the right to vote in federal elections of members of the uniformed services and merchant marine, their spouses and dependents, and overseas voters absent from the place of residence where they are otherwise qualified to vote).

cause judicial review is not available under the Administrative Procedure Act. Gov't Br. 16-33.

1. Appellees contend (Br. 74-83) that there are "meaningful standard[s] against which to judge the agency's exercise of discretion." Br. 74 (quoting *Webster* v. *Doe*, 486 U.S. 592, 600 (1988), and *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). They first seek to derive such standards from the reference to "actual Enumeration" in the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the reference to persons "in each State" in Section 2 of the Fourteenth Amendment. But the textual commitment of the taking of the census to the Secretary's discretion—"in such form and content as he may determine," 13 U.S.C. 141(a)—contains no exception permitting judicial review for alleged constitutional violations. We recognize that in *Webster* v. *Doe*, 486 U.S. at 603-604, the Court distinguished between constitutional and non-constitutional claims, and indicated that a "heightened showing" was necessary to establish a bar to review of the former. *Webster*, however, involved an alleged violation of a distinctly personal right. This case implicates no such distinctly personal right extrinsic to the constitutional provisions governing the conduct of the census; it involves an alleged violation of the census provisions themselves. Appellees thus assert the interest—which is shared by all 250 million people of the United States (and the States in which they reside)—in having Congress conduct a census that complies with whatever standards the Constitution may lay down. Cf. *Valley Forge Christian College, Inc.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-483 (1982); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216-222 (1974).

Moreover, the Census Clause provides for the census to be made "in such Manner as they [the Congress] shall by Law direct." That constitutional text "fairly exudes deference" to Congress (and, here, its delegee), *Webster*, 486 U.S. at 600, and thus weighs heavily against carving out

an exception to the "agency discretion" bar for a supposed constitutional violation. Nor do the general phrases that appellees seize upon—"actual Enumeration" in the Census Clause and "in each State" in the Fourteenth Amendment—add any force to their claim. The former is modified by the open-ended and discretionary phrase "in such Manner as they shall by Law direct," and the latter merely reflects the proposition that persons are to be counted in relation to the States, without furnishing any standards to resolve cases such as this.

In any event, if judicial review of appellees' claims based on the Constitution is not barred, those claims are readily disposed of on the merits. If Congress had enacted a statute requiring inclusion of federal personnel abroad based on home of record or comparable data, the constitutional question under the Census Clause—as under any other grant of plenary authority to Congress—would be whether there is any rational basis supporting Congress's decision. See *Preseault* v. *ICC*, 494 U.S. 1, 17-19 (1990) (Commerce Clause); *Perez* v. *Brownell*, 356 U.S. 44, 60 (1958) (Necessary and Proper Clause). For the reasons given above (see pages 4-8, *supra*) and in our opening brief (at 34-37), we think it clear that Congress could rationally decide to allocate persons serving abroad among the States on the basis of home of record.[8] It follows that there is no valid constitutional objection to the same course adopted by the Secretary, pursuant to an unbridled delegation of authority from Congress.

Contrary to appellees' contention (Br. 11-13, 58-65), nothing in the text or background of the Fourteenth Amendment suggests that the phrase "in each State" compels a different result. Indeed, both before and after adoption of the Amendment, the Census Acts and enumerators' instructions provided for counting persons in a

[8] There is no APA-type requirement in such a constitutional case that the judgment be based on a legislative record or that the justifications for the approach chosen be articulated. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980).

State even though they had been absent for a considerable period. See pages 2-6, *supra*.[9]

Appellees find "strong evidence" for their Fourteenth Amendment argument in what they say was the decision by census authorities in 1870 to count Union soldiers who then were stationed in the South in the States where they were stationed, claiming that it was contrary to the "natural inclinations" of federal census authorities. Br. 63-64. Both the premise and conclusion of this argument are flawed. There was no specific instruction on where to count troops until 1880, and it is unclear whether, prior to that time, they were apportioned where based in the United States or at their family home. See note 4, *supra*. The latter practice was, in fact, specifically required in the 1900 instructions. Stip. ¶ 10 (J.A. 175). Moreover, the passage in the district court's opinion that appellees

[9] Appellees rely (Br. 11-12, 58-63) on Congress's rejection of proposals to limit those to be counted for apportionment purposes under the Fourteenth Amendment to "citizens" or "legal voters," in favor of the whole number of "persons" in each State. That deliberate decision to ensure an expansive reach of the "respective Numbers" of the States scarcely supports appellees' contention that the Fourteenth Amendment *narrowed* the category of persons who could be counted by excluding those who were absent from a State for a considerable (but unspecified) time.

Appellees also rely (Br. 18, 55-56) on a 1988 letter from the Acting Assistant Attorney General for Legislative Affairs stating that the Justice Department entertained "serious doubts" about whether the Fourteenth Amendment would permit inclusion of overseas federal personnel in census counts. J.A. 241. That letter expressly did not state a definitive view on the issue, observing (in a portion of the relevant paragraph omitted by appellees) that "we continue to review the case law and legislative history pertinent to resolution of this question." *Ibid.* A footnote to the same sentence states that the Commerce Department had advised that the Census Bureau never counted military and State Department personnel stationed abroad. J.A. 241 n.13. That information was, of course, wrong. Finally, both the Commerce Department and the Acting Assistant Attorney General apparently were unaware of the previous 1969 legal opinion approving inclusion of overseas personnel in the apportionment counts. Gov't Br. 6.

cite for this proposition only states (without citation to any supporting authority) that northern troops were "apparently" counted at their posts. In any event, the number of Union troops in the South in 1870 was not large, and it is not at all clear that counting them in the South in that year (or the decade to come) would have run counter to the "natural inclinations" of federal census takers. For 1870 was the height of Radical Reconstruction, and the electorate was controlled by Union military governors. See 2 S.E. Morrison & H.S. Commager, *The Growth of the American Republic* 42-43 (4th ed. 1956).[10]

Finally, there is no merit to appellees' repeated suggestion (Br. 5, 20, 39-40 & n.12, 56-57, 66) that the manner in which overseas federal personnel and their dependents were counted did not constitute an "actual Enumeration"

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[10] Appellees cite (Br. 67-69) *Carrington* v. *Rash*, 380 U.S. 89 (1965), but the case is inapplicable. *Carrington* involved an equal protection challenge to an irrebuttable presumption affecting the exercise of the fundamental right to vote. While *Carrington* held that a State could not *always* deem the service member to be a voting resident of the State where he was a legal resident at the time of enlistment, even if he otherwise satisfied the generally applicable standards of residence in the State, it did not hold that a State could *never* deem the service member to be a resident of the State of his home of record, even where, as here, he or she is overseas, rather than in another State (as in *Carrington*). Moreover, it said nothing about whether the Federal Government may make a categorical judgment that an individual should be regarded, for census purposes, as belonging to the "respective Numbers" of the State where he enlisted.

Significantly, the Court in *Carrington* noted, quoting a 1964 Defense Department survey of state voting qualifications, that "[f]or voting purposes the legal residence of members of the Armed Forces is generally the State from which they entered military service" (380 U.S. at 92 n.3)—home of record. That prevailing practice further undermines appellees' argument in this case that residents of Massachusetts and other States who enlist in the Armed Forces do not retain substantial ties to their home of record and that the Census Bureau's reliance on that method here constituted a radical departure from the way in which military personnel have been treated generally.

within the meaning of the Census Clause. The Census Bureau did not speculate about or estimate the number of such persons. They were *counted*—in a precise total, 919,810 (Stip. ¶ 53 (J.A. 185))—on the basis of information principally furnished by the Defense Department identifying which of its personnel were stationed abroad and how many dependents they had. The Defense Department and Census Bureau then relied on home of record or comparable data that had been furnished on individual forms by those personnel in order to allocate them among the States. Nothing in the Census Clause suggests that this procedure was unconstitutional because each individual involved was not personally visited by a Census Bureau enumerator. That has not been the practice for some time. Census data are commonly collected from forms, prepared by one person on behalf of a family; the Bureau then counts people from the completed form. Indeed, when that method fails, census personnel will ask for information from a neighbor or other source thought to have knowledge. Furthermore, historically, persons in a prison, military post, or other institution were treated as a "family" for census purposes, and it was usually sufficient for the enumerator to contact the head of the "family"—*i.e.*, prison warden or base commander—to obtain the necessary information about the persons under his custody or command. See, *e.g.*, J.A. 93; C.D. Wright & W.C. Hunt, *History and Growth of the United States Census: 1790-1890*, at 156-157 (1900). The method used here was indistinguishable as a constitutional matter.

2. With the constitutional issues thus removed from the case, appellees' objections to the state census counts are reduced to garden-variety APA claims, principally based on the contention that the Census Bureau did not adequately explain the particular subsidiary matter in the conduct of the census that appellees challenge—the manner of including federal personnel abroad. As we have explained (Gov't Br. 19-21, 23-27, 31-33), Congress committed the "form and content" of the census to the

Secretary's discretion, and there is no "law to apply" in deciding this case.

Citing cases that have relied on agency regulations as a basis for law to apply—a question left open in *Chaney*, 470 U.S. at 836—appellees contend (Br. 76-80) that the "usual residence" policy furnishes such "law" here. In a case such as this, however, that approach would circumvent the standard Congress prescribed in the APA itself: whether the agency action has been "committed to agency discretion *by law*." 5 U.S.C. 701(a)(2) (emphasis added). Here, there can be little doubt that the applicable "law" (13 U.S.C. 141(a)) commits the conduct of the census to the Secretary's discretion. An *agency*'s decision to adopt regulations, not required by the governing statute, to guide the exercise of its discretion, should not lightly be taken to confer a right of judicial review that *Congress* has withheld by the breadth and nature of its delegation. But even if we assume that actual regulations might in some circumstances suffice (on the premise that the agency intended and had the authority to bind itself to a judicially enforceable channeling of its discretion), the concept of "usual residence" furnishes no such basis here. That concept is embodied nowhere except in the conduct of *prior* censuses by the Census Bureau. It is, significantly, not in the Census Act or any regulation. Procedures followed in a prior census do not bind the agency one or many decades later, because each census is a separate undertaking. Furthermore, as we have explained, the principle of "usual residence" has been modified and departed from by the Secretary, in his discretion, over the years; the "usual residence" principle furnishes no guidance for a court to determine whether a modification or departure is appropriate.

Remarkably, appellees also contend (Br. 80-81) that "pragmatic concerns" weigh in favor of judicial review here. Pragmatic concerns, in fact, point decisively to the opposite conclusion. If review is available, the myriad administrative decisions that must be made in the course

of the census will invite numerous, parochial, and often competing lawsuits by individuals, local governments, and States. Chaos and uncertainty would be inevitable for all concerned—the Census Bureau, Congress, the States, local governments, candidates, and interested citizens. See Gov't Br. 24-27.

3. Appellees try (Br. 83-88, 111-114) to minimize the import of Congress's decision to vest directly in the President the responsibility for submitting the statement of reapportionment to Congress, characterizing that responsibility as purely "ministerial." We disagree with appellees' characterization even as regards the statement the President transmitted to Congress on January 3, 1991. While it is true that the method of equal proportions calls for application of a set mathematical formula to the state population totals produced by the census, the President's constitutional duty to "take Care that the Laws be faithfully executed" (Art. II, § 3) would entitle (if not obligate) him to direct a reexamination of the census totals if he believed they were flawed in some substantial respect.[11] But however that may be, the President's decision whether to transmit a *second* statement to Congress to supersede the one required by 2 U.S.C. 2a—if authorized at all—is plainly not a ministerial duty.[12]

Appellees assert (Br. 88-89) that the 2½ years between the census and first congressional election following reapportionment furnishes "ample time" to conduct what it terms the "minimal review" contemplated by the APA. That assertion is difficult to square with appellees' vig-

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[11] Appellees cite (Br. 87 n.28) Senator Vandenberg's characterization of the President's function as ministerial. Senator Black, however, took a contrary view. See 71 Cong. Rec. 1845-1846 (1929).

[12] Appellees do not challenge our position that the President is not subject to suit under the APA, contending that it is "irrelevant" because "no action or omission by the President or his staff has been called into question or otherwise put at issue in this litigation." Br. 113 n.36. If true, the President should not have been named by appellees as a defendant, and should be dismissed from the suit.

orous (but unsuccessful) opposition to our application for a stay of the district court's judgment, in which Massachusetts insisted that it needed immediate assurances from this Court in order to carry out its elections. And while appellees point to the brief time between the filing of dispositive motions in district court below and oral argument in this Court, that has been accomplished only by means of an extraordinarily expedited briefing and argument schedule. Moreover, this case is not the end of the line. A large number of other census cases are waiting in the wings. As a result, unless the Court holds that judicial review is barred, a disposition of this case on the merits will not, even now, bring finality to the 1990 census and the apportionment of Representatives among the States for the next decade. Congress did not intend the census—which historically has been free from litigation (Gov't Br. 23)—to be subject to such piecemeal and unwieldy intrusion by the courts.

In their final effort to overcome the barriers to judicial review, appellees quote, wildly out of context, a floor statement by Senator Vandenberg in 1929 that Congress should not "leave the problem wholly to the voluntary instincts and attitudes of Congress itself." Br. 93-94 (quoting 71 Cong. Rec. 1611-1612 (1929)). Senator Vandenberg was explaining why the automatic apportionment mechanism was necessary, since Congress had failed to enact an apportionment law following the 1920 census. He in no way suggested that the courts could intervene and upset the finality of the census and resulting apportionment.

C. *The Reasonableness of the Secretary's Decisions.* Appellees' objections (Br. 38-52) on the merits to the Secretary's inclusion of overseas personnel in the census counts are both factually misleading and insubstantial.

1. Appellees state (Br. 52) that the home of record data had been "proven unreliable" by the 1970 census. In fact, what the Census Bureau witness said in the 1976 congressional testimony on which appellees base this entire

point was that the Census Bureau did not plan to include overseas federal personnel in the census counts for 1980 for a variety of logistical and other reasons, one of which was that "[t]he data on 'home State' of those overseas are of an *unknown reliability*" (emphasis added), because the Census Bureau believed at the time that a service member could select a home of record to obtain the advantage of a low or no income tax in the State involved. See Gov't Br. 7 (quoting J.A. 61-62). The witness cited for that proposition a 1976 study of a commission on taxation of military income. J.A. 61 n.3. That study in fact discusses the ability of a service member to select his or her *legal residence* in order to obtain tax advantages; the study did not address home of record, which represents the service member's permanent or actual home at the time of enlistment, and thus cannot readily be selected for tax purposes. See Gov't Br. 45-46 & n.28. The 1990 Congressional Research Service study of the three available methods for allocating overseas personnel confirmed that it is legal residence data that may be skewed because of tax considerations. See Gov't Br. 43 n.26. Thus, whatever uncertainty had been generated in 1976 about the reliability of home of record data because of the Census Bureau's misunderstanding was dispelled before the Secretary made his decision in July 1990 to use home of record data.

2. Appellees repeatedly assert (Br. 24, 44, 52, 56, 67) that the Census Bureau previously had concluded that it would be "arbitrary" to allocate overseas federal personnel among the States according to home of record data, and then fault the Secretary for not explaining adequately his decision to use the data in the face of that prior assessment. Appellees mischaracterize the record. What appellees refer to is a statement in the enumeration and residence rules prepared by the Census Bureau in 1987 for the 1990 census, which, while observing that it had the discretion to include federal personnel abroad in the apportionment counts, J.A. 210-211, stated that the Bureau did not plan to do so in 1990 because "the assign-

ment to geography would be arbitrary and operationally difficult." J.A. 212. Fairly read, this statement means nothing more than that any method of allocating overseas personnel to particular States would have a certain "arbitrary" quality, presumably both because the personnel were abroad and therefore would not be physically present in the States in which they were counted, and because any rule of general applicability for determining the States to which overseas personnel "belong" would not perfectly capture the circumstances of every individual involved. In other words, the observation reflected a policy perspective expressed three years in advance of the 1990 census and subsequently revised by the Census Bureau and the Secretary, the official in whom Congress has vested responsibility for conducting the census.[13] Indeed, the fact that the document expressly cited the legal authority for apportioning the overseas personnel, and recognized that the decision was "discretionary," refute any suggestion that the document used "arbitrary" in an APA sense.

3. Appellees' contention (Br. 52-55) that the Secretary mindlessly adhered to the decision to allocate federal personnel abroad after cancellation of the Defense Department survey is plainly refuted by the record. The record shows that when the Secretary decided to include overseas personnel in the apportionment counts, he specified that this decision was contingent upon "timely receipt of acceptable data from the Defense Department," J.A. 122, not—as appellees would have it—upon completion of the planned Defense Department survey. The record then demonstrates

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[13] Appellees state (Br. 1) that the Secretary decided to "override" the rules adopted by the Censsu Bureau for the 1990 census. In fact, it was the Census Bureau that "propos[ed]" including federal personnel overseas in the apportionment counts (J.A. 120), and recommended use of home of record data after cancellation of the Defense Department survey. J.A. 164. In any event, responsibility for the census rests by law with the Secretary. See *INS* v. *Doherty*, 112 S. Ct. 719, 726-727 (1992).

that, after cancellation of the survey, the agency reviewed the available data and satisfied itself that the method it proposed to use "will satisfy our criterion that the best quality data be used for the 1990 census," J.A. 158, and would be "of sufficient quality for apportionment purposes." J.A. 162. Appellees may disagree with that conclusion, but that is not the issue. Rather (assuming the availability of judicial review), the issue is whether the agency considered the relevant factors after cancellation of the Defense Department survey, and the record establishes that it did.

D. *Remedy.* Applleees acknowledge that "[i]n most instances" a remand is the appropriate remedy for an APA violation, and that exceptions to this rule are available only "in rare circumstances." Br. 95. In arguing that this is such a "rare circumstance," appellees lose sight of the basis of their APA claim. Appellees claim that there is no time "to create a better method" for including overseas personnel in the census. Br. 98. But what appellees alleged and what the district court found violated the APA—incorrectly, in our view (see pages 16-19, *supra*)—is that "[t]here is no evidence that the Census Bureau considered reverting to its prior policy." J.S. App. 76a. If that is in fact the case, a remand is required to afford the Secretary the opportunity to engage in the allegedly omitted consideration. This is particularly true in light of the lower court's ruling that, if "properly supported," "[t]he policy decision to apportion overseas federal employees is well within the discretion afforded the Census Bureau under the Census Act" and is not "inherently unconstitutional." *Id.* at 79a, 81a n.31. By refusing to remand to the Secretary, the district court arrogated that "policy decision" to itself.

Whatever the propriety of the court's order requiring the Secretary to revise the tabulation of populations for every State, it had no authority to order the President to bring about a reapportionment of the House of Repre-

sentatives.[14] Equitable principles required denial of injunctive relief having so intrusive an effect on the coordinate Branches of the Federal Government and on the States. Gov't Br. 48-49.[15]

For the foregoing reasons and those in our opening brief, the judgment of the district court should be reversed and the case remanded with instructions to enter judgment for the appellants.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

APRIL 1992

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[14] Appellees try to avoid the implications of such relief by asserting that "the Secretary need not recompute census totals at all," since the parties stipulated that only Massachusetts and Washington would be affected, and that the court only ordered the Clerk to send new certificates to two States. Br. 109-110. However, the judgment below requires the Executive Branch defendants to submit to the Clerk a statement showing the number of Representatives to which each State would be entitled under 2 U.S.C. 2a "without inclusion of the overseas census counts in the apportionment count," and directs the Clerk to send to "each state" a "recertification" of the number of Representatives to which it is entitled, in accordance with the court's order. J.S. App. 95a. The former clearly calls for a revision of the "apportionment count" by deleting overseas personnel from each State's population, and the latter clearly constitutes a reapportionment of the House.

[15] If the Court finds a violation of the APA by the Secretary, but agrees with us that a remand of the tabulation of state populations totals to the Secretary is the appropriate remedy, there is no occasion to consider whether the district court could ever order the President to transmit a new apportionment statement to Congress. Instead, the President's statement required by 2 U.S.C. 2a, on which the States' current "entitlements" are based, should remain in effect pending completion of the proceedings on remand and submission by the Secretary of any new or revised report to the President. The President would not be called upon to consider transmitting a new statement to Congress unless and until the Secretary submitted a revised tabulation that would result in a different apportionment.

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